Nos. 87-1642 and 87-1814

In the Supreme Court of the United States

OCTOBER TERM, 1987

CABLEVISION COMPANY, PETITIONER

v.

MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL.

NATIONAL CABLE TELEVISION ASSOCIATION, INC., PETITIONER

v.

COLUMBIA PICTURES INDUSTRIES, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 111 of the Copyright Act of 1976, 17 U.S.C. (& Supp. IV) 111, establishes a compulsory license under which cable television operators may retransmit local and distant broadcast television signals if they pay a royalty fee. The fee is "computed on the basis of specified percentages of the gross receipts from subscribers * * * for the basic service of providing secondary transmissions of primary broadcast transmitters * * *." 17 U.S.C. (Supp. IV) 111(d)(1)(B). The question presented is whether a regulation issued by the Copyright Office, under which "gross receipts" includes the full amount of the subscription fees paid for any package (or "tier") of services offered at a single price that includes at least one broadcast signal, even if that tier also includes original nonbroadcast signals, is contrary to the Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a)[1] is reported at 836 F.2d 599. The opinion of the district court (Pet. App. 36a-58a) is reported at 641 F. Supp. 1154.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1988. Petitioner Cablevision Company filed its petition for a writ of certiorari on April 4, 1988. On March 22, 1988, the Chief Justice extended petitioner National Cable Television Association's time for filing a petition for

[1] The opinions of the court of appeals and the district court appear at the same pages in the appendices of both petitions.

a writ of certiorari to May 4, 1988, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1968, this Court held that a cable television operator does not infringe the copyrights on television programs when it intercepts and retransmits to its subscribers the signal broadcast by a television station. *Fortnightly Corp.* v. *United Artists Television,* 392 U.S. 390. In 1974, the Court held that the same rule applies even when the cable system imports a distant station that could not be received by its subscribers using ordinary antennas. *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.,* 415 U.S. 394. In so ruling, the Court noted that the retransmission by a cable system of distant broadcast signals might harm the economic interests of the copyright holders; however, the remedy for any such problem, the Court suggested, lay with the legislature (*id.* at 413-414 n.15).[2]

Congress fashioned a remedy as part of the comprehensive revision of the copyright laws in 1976. Copyright Act of 1976, 17 U.S.C. (& Supp. IV) 101 *et seq.* Recognizing "that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable

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[2] The problem for copyright owners, it was suggested, was that, because the programs would be broadcast in the distant market via cable, the owners might find it harder to sell their programs there directly. At the same time, they might not receive higher fees from the broadcast station, because that station might not be able to recoup such fees from its local advertisers, who might have no economic interest in paying for additional viewers who are too distant to be likely customers. 415 U.S. at 413-414 n.15; see Pet. App. 7a.

system" (H.R. Rep. 94-1476, 94th Cong., 2d Sess. 89 (1976)), Congress adopted a simplified compulsory license scheme that permits a cable system to retransmit television broadcast signals but requires, in return, the payment of a royalty fee, which is eventually distributed to the copyright owners. Section 111, 17 U.S.C. 111.[3] The statutory formula for computing the royalty fee (Section 111(d)(1)(B)-(D)) reflects Congress's judgment that copyright owners require compensation primarily for the retransmission of distant rather than local stations, because local stations already intend to make their signals available to local viewers. It also reflects the judgment that importing a distant station causes considerably less harm if that station is a network affiliate rather than an independent station, because the copyright owner already intends to have network programs reach a nationwide audience. See H.R. Rep. 94-1476, *supra,* at 90. By contrast, a cable system's retransmission of non-network programming from distant stations, Congress concluded, "adversely affects the ability of the copyright owner to exploit the work in the distant market" (*ibid.*).

The royalty fee is a percentage of a cable system's "gross receipts from subscribers to the cable service * * * for the basic service of providing secondary transmissions of primary broadcast transmitters" (Section 111(d)(1)(B)). Except for small operators (Section 111(d)(1)(C) and (D)), the percentage is based on the number of distant signals carried by the particular operator, calculated according to a system of "distant signal equivalents" (DSEs) that assigns different values to different types of distant signals—commercial independent stations, 1.0; network

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[3] "Section ____" hereafter refers to a section of the Copyright Act and, hence, of Title 17 of the United States Code, as amended.

or non-commercial stations, 0.25 (Section 111(f)).[4] Small cable systems—those with gross receipts less than certain figures—pay fixed percentages of their gross receipts in lieu of calculating their DSEs (Section 111(d)(1)(C) and (D)).

Every six months, each cable system must deposit with the Register of Copyrights, "in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal, * * * prescribe by regulation * * *," both "a statement of account," which reports gross receipts among other items, and the amount of the royalty fee that is due (Section 111(d)(1)). The Copyright Office deposits the money in the Treasury (Section 111(d)(2)). The Copyright Royalty Tribunal then distributes the money to copyright owners whose works were retransmitted beyond their local broadcast areas (Section 111(d)(3) and (4)).

b. This case concerns the meaning of the term "gross receipts * * * for the basic service of providing secondary transmissions" (Section 111(d)(1)(B)). In 1976, Congress described a "typical system" as "a central antenna which receives and amplifies [broadcast] television signals" and transmits them to subcribers through cables (H.R. Rep. 94-1476, *supra,* at 88).

> In addition to an installation charge, the subscribers pay a monthly charge for the basic service averaging

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[4] The Act set the initial rates at 0.675% of gross receipts for the first DSE, 0.425% for each of the next three DSEs, and 0.2% for each additional DSE. A fraction of a DSE is computed at its fractional value. Each cable system must pay a minimum of 0.675% for the right to carry any distant signal, even if its total DSEs are less than 1.0. Section 111(d)(1)(B).

The Copyright Royalty Tribunal (CRT) was empowered to adjust the rates to account for inflation or deflation, certain changes in the average rates paid by subscribers for cable service, and certain changes in Federal Communications Commission rules. Section 801(b)(2)(A)-(C). Currently, the basic rates are 0.893% for the first DSE, 0.563% for each of the next three, and 0.265% for each additional DSE, with a 0.893% minimum. 37 C.F.R. 308.2(a). There are exceptions. See, *e.g.*, 37 C.F.R. 308.2(c) and (d).

> about six dollars. A large number of these systems provide automated programming. A growing number of CATV systems also originate programs, such as movies and charge additional fees for this service (pay-cable).

Shortly after the Act went into effect, the Copyright Office, in issuing regulations, explained that broadcast and non-broadcast services sold in a single package as part of a "basic service" would not be unbundled for royalty purposes: if a cable system charged a single monthly fee for service "that include[d] retransmission of radio and television signals and local origination (such as time and weather and automated news services)," it could not allocate a portion of the fee to the non-broadcast services, but rather had to include the entire fee in its calculation of "gross receipts." 43 Fed. Reg. 27827, 27828, 27832 (1978).

In the years since the 1976 Act, the cable market changed. Systems have come to rely heavily on a large number of original cable channels, such as ESPN and Cable News Network, that typically are distributed by satellite and carry commercials. In addition, several broadcast stations, such as WTBS from Atlanta and WGN from Chicago, are distributed nationwide by satellite (so-called superstations). Many cable systems offer a single package of stations, including local broadcast stations, distant broadcast stations (including superstations), and original cable stations, all for a single monthly charge. Other cable systems offer subscribers two or more different levels (or "tiers") of services, each tier containing a particular package of stations for a single price. Often, even the highest tier contains at least one broadcast station. On top of these tiers of service, most cable systems also offer channels, such as HBO or Showtime, for which subscribers usually pay a separate fee. See Pet. App. 11a-12a.

In 1981, in light of these developments, the Copyright Office "undertook an exhaustive reevaluation of its regulations" (Pet. App. 13a) to determine how to apply the term "gross receipts" when a cable system charges a single price for a package of stations that includes local and distant broadcast stations (including superstations) as well as original cable stations. See 46 Fed. Reg. 30649-30650 (1981). At public hearings, petitioner National Cable Television Association (NCTA) opposed prorating single subscriber fees for single tiers according to the portions of broadcast and non-broadcast channels, arguing that such a step would "add an undue complication," might lead to "substantial litigation and dispute" and "could create a regulatory monster" (C.A. App. 325-327; see Pet. App. 13a-14a). The Copyright Office subsequently adopted a regulation that provides that "[g]ross receipts for the 'basic service of providing secondary transmissions of primary broadcast transmitters' include the full amount of monthy (or other periodic) service fees for any and all services or tiers of services which include one or more secondary transmissions of television or radio broadcast signals." 37 C.F.R. 201.17(b)(1); 49 Fed. Reg. 13029 (1984). Gross receipts, under the regulation, do not include "charges for pay cable or other program origination services: *Provided* That, the origination services are not offered in combination with secondary transmission service for a single fee" (*ibid.*).

2. While the Copyright Office's rulemaking proceedings were pending, petitioners filed separate suits in the United States District Court for the District of Columbia against groups of copyright owners, seeking declaratory judgments establishing that their own definitions of "gross receipts" should apply (Pet. App. 14a-15a). Petitioner Cablevision argued that the term includes only the amount that a cable system charges for its lowest

available tier of service, even if the higher tiers include additional broadcast stations (*id.* at 14a). Petitioner NCTA, in contrast, abandoned the position that it had taken at the Copyright Office hearings and argued that the single charge for a mixed tier of broadcast and non-broadcast channels should be allocated between those channels, and only the portion for the broadcast channels should be included in gross receipts (*id.* at 15a). The district court rejected Cablevision's approach as inconsistent with Congress's intent, but it accepted NCTA's approach, and ordered the Copyright Office to devise a method of unbundling the broadcast revenues from mixed-tier, single-fee revenues (*id.* at 36a-56a).

3. The court of appeals rejected both petitioners' approaches and upheld the view adopted by the Copyright Office (Pet. App. 1a-35a). The court first noted (*id.* at 17a) that the Copyright Act contains both a general authorization for the Register of Copyrights (head of the Copyright Office) to issue regulations and a specific authorization for him to establish "requirements" by regulation for the deposit of cable royalty fees (Sections 702, 111(d)(1)). Congress intended that the courts defer to the Register's "reasonable interpretations" of Section 111, the court reasoned, because "a holding that forced resolution of every dispute in an infringement or declaratory judgment action would be unfaithful to" Congress's choice to reject as "unworkable" a "traditional, contract-based" scheme in favor of "a low cost" scheme (Pet. App. 18a-19a). Moreover, the court concluded, both the Copyright Office's expertise in the area (compared with that of courts), and the principle recognized in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-866 (1984), that it is appropriate for an agency to make policy choices to resolve statutory ambiguities, entitle the Copyright Office to deference in applying Section 111. Pet. App. 19a.

In any event, the court of appeals held that the Register's regulation implementing the key phrase in the statute, "gross receipts * * * for the basic service of providing secondary transmissions," was valid. That interpretation, the court found, was the one "that best accounts for the statutory language"; the petitioners' interpretations, in contrast, would not give effect to every word of the statute (Pet. App. 22a).[5] Further, the court explained, "Congress picked a *convenient* revenue base" for its DSE formula: it deliberately included in that base revenues from retransmissions of *local* broadcasts even though those retransmissions are not reimbursed by the royalty fund, because including such revenues would be "more practical" than attempting to separate them (*id.* at 23a-24a (emphasis in original)). "We find no requirement in the statute or its history that the fee paid by a cable system reflect precisely the value it received from retransmissions * * *. Congress instead chose an easily calculable revenue base * * *. The Copyright Office has simply continued that practice" (*id.* at 24a). In contrast, under petitioner NCTA's allocation approach, "[m]ethodological wrangles and monitoring expenses far in excess of those required under the Copyright Office's regulation are easily foreseeable and would thwart the congressional goal of minimizing transaction costs" (*id.* at 25a). Petitioner Cablevision's approach, which limits calculations to revenues from the first tier, is not as complex, the court observed, but the court found it "untenable, since it could

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[5] Petitioner NCTA's position, requiring allocation between broadcast and non-broadcast channels, "reads 'basic service' out of the statute," the court concluded, while petitioner Cablevision's view that only the lowest tier of service is counted, no matter what its content, makes "superfluous" the phrase "of providing secondary transmissions," a term that "would seem to serve the purpose in the statute of explaining 'basic service' " (Pet. App. 22a).

lead to the absurdity of only a minuscule portion of revenues, at the option of a cable company, being included in gross receipts—hardly a reasonable interpretation of Congress' objective" (*id.* at 29a-30a (footnote omitted)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is unwarranted.

1. Petitioners challenge (87-1642 Pet. 11-26; 87-1814 Pet. 9-22) the court of appeals' ruling that deference was owed to the views of the Copyright Office about how best to apply the statutory "gross receipts" concept to mixed-tier cable television services. As an initial matter, we think it is clear that the court of appeals' decision would have been the same even if it had given no deference to those views. The court specifically rejected petitioner Cablevision's position as an untenable construction of the statute (Pet. App. 29a), and it reasoned that the Copyright Office's view was in fact a better reading of the statute than either of petitioners' readings (*id.* at 21a-29a). Thus, we doubt that the primary issue urged by petitioners is squarely presented by the decision below. In any event, petitioners' challenge to this aspect of the court of appeals' decision is meritless.

a. The Register of Copyrights has ample authority to issue regulations such as the one at issue in this case. First, the Register has general rulemaking authority for the entire range of his activities (subject to the approval of the Librarian of Congress). Section 702.[6] The Register has for

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[6] Section 702 provides:

> The Register of Copyrights is authorized to establish regulations not inconsistent with law for the administration of the functions and duties made the responsibility of the Register under this

decades been issuing regulations under that authority, including substantive implementations of the copyright laws. 37 C.F.R. Pts. 201-202. See *Mazer* v. *Stein*, 347 U.S. 201, 211-213 (1954).

Moreover, the Register has specific authority to regulate cable television copyright fees paid under Section 111. Under Section 111(d)(1), a cable system using the compulsory license process must deposit with the Register semiannually its "statement of account" and its royalty fee, "in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal * * *, prescribe by regulation." Nothing in this provision limits the Register's role to mechanical and ministerial tasks, as petitioners insist (87-1642 Pet. 14-16; 87-1814 Pet. 10, 12-14). The power to "prescribe by regulation" the "requirements" for filing a "statement of account," as well as for filing the royalty fee itself, readily includes the authority to establish particular accounting practices, such as what items are to be counted as "gross receipts" and what methods, if any, are acceptable for allocating sums shown on the books of a cable company to the items required to be reported. Indeed, the fact that petitioner Cablevision, a major nationwide cable system operator, offers so different an interpretation of the Act than petitioner NCTA, the industry's leading trade association, itself suggests the chaos that could result if the Register could not go beyond mechanical tasks in establishing "requirements" under Section 111. Congress gave the Copyright Office regulatory power to help make the compulsory license system work.

b. In recognition of the Register's authority to adopt regulations and otherwise to interpret the Copyright Act,

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title. All regulations established by the Register under this title are subject to the approval of the Librarian of Congress.

this Court and many other courts have long accorded deference to the Register's substantive views on copyright questions. In the landmark case concerning whether a work of art that is incorporated into a useful object may be copyrighted, this Court reached its decision only after an extensive discussion of the Copyright Office regulations and practices dating back to 1870; the Court followed the then-current regulation, noting that it was "a contemporaneous and long-continued construction of the statutes by the agency charged to administer them * * *." *Mazer* v. *Stein*, 347 U.S. at 211-213. Similarly, in *Goldstein* v. *California*, 412 U.S. 546 (1973), this Court reached its decision on whether mechanical recordings are subject to copyright "[i]n light of th[e] consistent interpretation by the courts, the agency empowered to administer the copyright statutes [the Copyright Office], and Congress itself" (*id.* at 568-569). The courts of appeals have also deferred to Copyright Office regulations with great frequency.[7]

Unsurprisingly, most of the cited decisions involve questions of what may be copyrighted, but the substantive nature of such questions is wholly inconsistent with Petitioners' attempt to characterize the Copyright Office as performing only ministerial or mechanical tasks. In any event, the decisions according the Office deference are not limited to copyrightability questions.[8] The provisions at issue here simply require the Copyright Office to apply its

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[7] See *Norris Industries* v. *ITT*, 696 F.2d 918, 922 (11th Cir.), cert. denied, 464 U.S. 818 (1983); *Schnapper* v. *Foley*, 667 F.2d 102, 110 (D.C. Cir. 1981), cert. denied, 455 U.S. 948 (1982); *Esquire, Inc.* v. *Ringer*, 591 F.2d 796, 801 (D.C. Cir. 1978), cert. denied, 440 U.S. 908 (1979); *Eltra Corp.* v. *Ringer*, 579 F.2d 294, 297-298 (4th Cir. 1978).

[8] See, *e.g.*, *National Conference of Bar Examiners* v. *Multistate Legal Studies, Inc.*, 692 F.2d 478 (7th Cir. 1982), cert. denied, 464 U.S. 814 (1983).

judgment in a part of the cable television field that, like other areas of copyright, is committed to the Register's superintendence. The court of appeals correctly followed the consistent judicial practice of according the Copyright Office due deference within its areas of responsibility.[9]

De Sylva v. *Ballentine,* 351 U.S. 570, 577-578 (1956), relied on by petitioner Cablevision (87-1642 Pet. 13-14) but not by petitioner NCTA, expressly recognizes that deference should be afforded to interpretations of the Register in appropriate circumstances. There, the Register "frankly admitted" that the Copyright Office practice at issue was "more the result of a decision that there [was] substantial doubt over the question, rather than the result of a confident interpretation of the statute" (351 U.S. at 577). Thus, said the Court, "[a]lthough we would ordinarily give weight to the interpretation of an ambiguous statute by the agency charged with its administration [citing *Mazer*], we think the Copyright Office's explanation of its practice deprives the practice of any force as an interpretation of the statute * * * *in this instance*" (351 U.S. at 577-578 (emphasis added)). Here, in contrast, the Register made the sort of definite interpretation of the statute to which deference is due (Pet. App. 20a-21a).

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[9] Petitioner Cablevision emphasizes that in at least some of the copyrightability cases "the Courts noted both the Copyright Office's decades of experience, and the fact that Congess had approved and ratified the Office's position when it revised the copyright laws in 1976" (87-1642 Pet. 13 n.7). But this is hardly an argument for refusing to afford due deference to the Office's judgments in the cable field: the lesser experience and lack of congressional reliance on the Office in this field is simply attributable to its newness. Of course, the *degree* of deference depends on the circumstances. Here, for example, it was entirely proper for the court of appeals to take account of the recent vintage of the cable TV regulations while noting that "the agency has had time to accumulate experience" since the 1976 revisions (Pet. App. 19a).

Similarly, *Bartok* v. *Boosey & Hawkes, Inc.*, 523 F.2d 941 (2d Cir. 1975), on which both petitioners rely (87-1642 Pet. 13-14; 87-1814 Pet. 10-11), does not create a conflict among the circuits. The court there merely refused to give controlling weight to a definition of "posthumous" that appeared on a Copyright Office form, noting that "it is unlikely, when preparing the form, that the Register of Copyrights considered the situation" (523 F.2d at 946-947 & n.10). It also concluded that the definition was inconsistent with legislative intent, rendering the court's brief remarks on deference dicta.[10] Finally, *Bartok* did not involve the Register's powers under Section 111. In circumstances like those here, involving a well-considered decision about how to implement Section 111, there is no reason to think that the Second Circuit would apply any different standard of deference from that applied by the court below.

c. Petitioners' suggestion that the Register is not entitled to deference because "[f]rom its inception, * * * the Copyright Office has had an institutional bias favoring copyright owners" (87-1814 Pet. 14-15) is wholly unfounded. See also 87-1642 Pet. 12. The evidence offered consists almost entirely of a single statement by the former

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[10] The *Bartok* court said that "the Copyright Office has no authority to give opinions or define legal terms and its interpretation on an issue never before decided should not be given controlling weight" (523 F.2d at 946-947 (footnotes omitted)). The court offered wholly inadequate support for this statement. The first point mistakenly relies on an irrelevant regulation, which merely provides that the Copyright Office will not give opinions in specific concrete cases. See 37 C.F.R. 201.2(a)(1). Petitioner NCTA's reliance on the same regulation (87-1814 Pet. 11) is similarly misplaced (see also 87-1642 Pet. 8). The *Bartok* court likewise offered no authority for the proposition that the Register may not "define legal terms." For the third proposition, regarding an issue of first impression, the court simply cited *De Sylva,* which, as we have shown, does not support so broad and sweeping a notion.

Register, Barbara Ringer, that "my responsibility is to one group and one group only, and that is * * * the authors of the so-called writings."[11] That statement, however, was not made in discussing the cable television issue or indeed in any rulemaking proceeding; it was made at a congressional hearing as part of the agency head's urging that Congress keep in mind whom it was trying to protect in drafting the 1976 revisions. Petitioners cite no evidence whatever that any alleged bias affected the way Ms. Ringer or her successors handled the issues presented here or any other issue.[12]

d. Petitioner NCTA argues (87-1814 Pet. 19-22) that deference cannot be given to the Copyright Office because that office is part of the Library of Congress, which in turn is part of the Legislative Branch, whereas only an Executive Branch agency may interpret statutes. This argument may not be raised in this Court, because it was not raised below. See *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). There is no occasion for making an exception in these cases: petitioner NCTA was on notice of the issue, as a case extensively discussing it was cited in the briefs below. See *Eltra Corp.* v. *Ringer*, 579 F.2d 294 (4th Cir. 1978).

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[11] *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 106 (1975). Petitioner NCTA also cites a statement by former Register Kaminstein that "I make no bones about favoring authors, composers, and artists" (*id.* at 94.)

[12] Petitioner NCTA relies (87-1814 Pet. 17) on a statement, in the preamble to certain interim regulations, that the Copyright Office "construe[s] the compulsory license strictly," 49 Fed. Reg. 14950 (1984). That statement, though, is a legitimate interpretation of the statute and not an indication of bias. If an agency, with its expertise and experience, concludes that its statute needs to be construed strictly, that conclusion is indistinguishable from any other conclusion about the meaning of a statute. If reasonable, it is entitled to deference.

In any event, the argument depends on the status of the Librarian of Congress, but petitioner NCTA fails to show why the Librarian should be equated, in terms of subservience to Congress, with the Comptroller General. See *Bowsher* v. *Synar*, 478 U.S. 714 (1986). The critical difference is that no statute gives Congress any role in the Librarian's removal from or appointment to office. The Librarian is appointed by the President, with the advice and consent of the Senate, and the statute is silent on removal. 2 U.S.C. 136. He is therefore removable solely by the President, since "[t]he general and long-standing rule is that, in the face of statutory silence, the power of removal presumptively is incident to the power of appointment." *Kalaris* v. *Donovan*, 697 F.2d 376, 389 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983); see *Cafeteria & Restaurant Workers Union, Local 473* v. *McElroy*, 367 U.S. 886, 896-897 (1961); *In re Hennen*, 38 U.S. (13 Pet.) 230 (1839). Moreover, the legislative history of the appointment provision (Act of Feb. 19, 1897, ch. 265, § 1, 29 Stat. 544) undercuts any suggestion that the Librarian is subservient to Congress. In the House debate over the provision, a member of the Joint Library Committee argued that the Library is a legislative agency and proposed an amendment that would place it squarely under the control of Congress. 29 Cong. Rec. 313-318 (1896) (remarks of Rep. Quigg). The floor manager on behalf of the Appropriations Committee replied (to "loud applause") that the Library "is an executive bureau, and as such should be presided over by some executive officer" (*id.* at 318-319 (remarks of Rep. Dockery)). The latter view prevailed in the House (*id.* at 319) and in conference (*id.* at 1947). In the end, all petitioner NCTA can point to is the mere label of the office.

2. Petitioners also challenge (87-1642 Pet. 27-29; 87-1814 Pet. 22-26) the Register's position, and the court of appeals' approval of it, on the merits. But, as the court of appeals correctly concluded, the Register's interpretation is, at a minimum, "based on a permissible construction of the statute" (*Chevron*, 467 U.S. at 843 (footnote omitted)). The statutory term, "the basic service of providing secondary transmissions of primary broadcast transmitters" (Section 111(d)(1)(A)), plainly does not determine unambiguously that mixed-tier services that include broadcast channels must be unbundled. Indeed, it tends to suggest, by its reference to the entire "basic service" of providing the specified transmissions, that such unbundling would be inappropriate. Moreover, what evidence there is shows that Congress did not specifically contemplate the question of royalty payments for cable systems' offering multiple, mixed tiers—a practice not prevalent in 1976. See, *e.g.*, Pet. App. 10a-11a, 27a. The Register's decision to require full inclusion of any tier that includes broadcast signals not only is well within the statutory language but, in stark contrast to petitioner NCTA's proposal, promotes the goal of administrative simplicity that lay behind Congress's establishment of the compulsory license system in the first place (H.R. Rep. 94-1476, *supra*, at 89). It also avoids the absurd position, which would be permitted by petitioner Cablevision's proposal, that cable operators could arrange their pricing to include only a minuscule portion of revenues in the lowest tier of service.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60497